IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. JEREMIAH W. (JAY) NIXON, Attorney General,	)	
Relator,	)	No. SC 86013
vs.	)	
HONORABLE MATT BLUNT, Secretary of State,	)	
Respondent.	)	

MEMORANDUM IN SUPPORT OF RESPONDENT'S AFFIRMATIVE DEFENSES[1]

The Attorney General is seeking a writ to compel the Secretary of State to "immediately undertake—and to complete by the end of the business day on May 25, 2004—his duties under Section 116.160 and other applicable statutes," to place a proposed constitutional amendment on the August 3, 2004, ballot. The precedents of this Court are clear and unambiguous that this writ is an inappropriate vehicle for such relief. Equally, the unambiguous text of several statutes defeats relief. However, the Attorney General does not appear to be daunted by the weight of adverse law and prays that this Court will likewise disregard the clearly established principles of law governing this action and grant

[1] Respondent submits this Memorandum pursuant to this Court's Order of May 24, 2004.

the peremptory and permanent writ. Secretary of State Matt Blunt respectfully requests that this Court uphold the law and that the Petition be dismissed.

LEGAL ARGUMENT

I. The Petition for Writ of Mandamus should be denied because Mandamus will not lie if Relator does not have a clearly established, pre-existing right to the duty sought to be performed (First Affirmative Defense).

"It is well-settled that the purpose of the writ [of mandamus] is to execute, not adjudicate, and to be entitled to a writ, the relator must have a clear, unequivocal, specific right to have an act performed." *Clay v. Dormire*, 37 S.W.3d 214, 218 (Mo. banc 2000) (citations omitted). This concept is followed in Missouri, as well as the other 49 states. (Appendix A). However, the Attorney General is disregarding this mountain of case law and is asking this Court to do the same.

By statute, the Secretary has a clear and unambiguous mandate to submit to all local election authorities ten weeks prior to any statewide election the legal notice which must be published. § 116.240 RSMo. That notice shall contain the date and time of the election and a sample ballot. *Id.* The ten-week deadline passed Tuesday, May 25, 2004. Prior to that date, the Secretary had yet to receive the authentic text of SJR 29 from the General Assembly, making it impossible for the Secretary to provide the notice pursuant to section 116.240. Therefore, the Secretary cannot comply with the clear mandates of law and still place this issue on the August ballot.

Because the ten week time limit in section 116.240 is plain and unambiguous, this Court must apply it as written. In order to rule for the Attorney General, this Court would have to declare section 116.240 unconstitutional. *State v. Burns*, 978 S.W.2d 759, 761 (Mo. banc 1998). However, "the writ will not issue if it is necessary in order to fix upon the respondent the duty sought to be enforced to declare a statute in conflict with such alleged duty unconstitutional." *State ex rel. Seigh v. McFarland*, 532 S.W.2d 206, 209 (Mo. banc 1976). *See also State ex rel. Mason v. County Legislature*, 75 S.W.3d 884, 888 (Mo. App. 2002); *State ex rel. Chiavola v. Village of Oakwood*, 931 S.W.2d 819, 825 (Mo. App. 1996); *State ex rel. City of Crestwood v. Lohman*, 895 S.W.2d 22, 27 (Mo. App. 1994). Thus, state officials are required to comply with the laws of the state until a court has declared the law unconstitutional. There is no authority, constitutionally or statutorily, for the Secretary to engage in an independent constitutional analysis of every statute placing a duty upon him. In fact, the Secretary is prohibited from engaging in such activity. *State ex rel. Mo. & N.A.R. Co. v. Johnston*, 137 S.W. 595, 598 (Mo. 1911) ("A ministerial officer has no right to pronounce an act of the General Assembly unconstitutional and so disobey it"). The Court recognized the chaos that would ensue if elected officials were given the power to declare statutes unconstitutional. "To what confusion would it lead if every ministerial officer in the state was endowed with authority or should assume authority, to pronounce . . . that an act of the General Assembly was unconstitutional, and for that reason he would disobey it." *Id.* The Attorney

General is requesting that this Court endorse such chaos by placing upon all elected officials the ability to perform a function of "the highest judicial character." *Id.*

The Attorney General presumably will argue that the importance of this issue, as well as the time constraints placed on the parties, should not be forgotten. While the issue is important to many citizens of Missouri, and time is of the essence, those are not sufficient for this Court "to violate the well-established provisions of the law of mandamus and to embark on new and unwise precedent that would encourage expanded use of the extraordinary writ to adjudicate and decide issues of law." *State ex rel. Mason v. County Legislature*, 75 S.W.3d at 888.

Therefore, the Secretary is obliged to comply with the mandates of section 116.240 until a court declares the statute unconstitutional. However, this case is not the proper case for such a declaration, and the Secretary requests that this court dismiss the petition as improvidently sought by the Attorney General.[2]

[2] The Attorney General agrees with Respondent that the Court has no power to declare section 116.240 unconstitutional on the pleadings in this case. *See* Petition at 12.

II. The Petition for Writ of Mandamus should be dismissed because the Attorney General has an adequate remedy at law, namely an action for declaratory judgment (Second Affirmative Defense).

As shown in the previous section, a writ of mandamus is not an appropriate vehicle to challenge the constitutionality of a statute. The law provides the declaratory judgment for such a purpose. "The [declaratory judgments] act furnishes a particularly appropriate method for the determination of controversies relative to the construction and validity of statutes and ordinances." *City of Joplin v. Jasper County*, 161 S.W.2d 411, 412-13 (Mo. 1942). *See also Regal-Tinneys Grove Special Road District of Ray County v. Fields*, 552 S.W.2d 719, 722 (Mo. banc 1977) and *State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69, 75 (Mo banc 1982).

The Attorney General essentially concedes this point because it coupled a mandamus action with a declaratory judgment action in its original Circuit Court lawsuit. (see Exh. 2 to Respondent's Suggestions in Opposition to Petition for Writ of Mandamus). It is axiomatic that "[m]andamus will not lie where another adequate remedy is available to relator." *State ex rel. J. C. Nichols Co. v. Boley*, 853 S.W.2d 923, 924 (Mo. banc 1993). Where a declaratory judgment action is filed, it provides an adequate remedy at law and no writ of mandamus should issue. *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 266-67 (Mo. banc 1980). Moreover, Missouri Civil Rule 84.22(a) provides that "no original remedial writ

shall be issued by an appellate court in any case wherein adequate relief can be afforded by an appeal."

Rather than seeking to establish the Secretary's duty by this mandamus case, the Attorney General should have appealed the decision of the Cole County Circuit Court to deny his petition for a declaratory judgment. The Circuit Court's order denied the petition without qualification and in its entirety, clearly ruling against the Attorney General on the declaratory judgment. The fact that time may be short is not relevant: "mandamus is not a 'short cut for the speedy resolution of disputes that adequately may be resolved by other means.'" *State ex rel. Kelcor Inc. v. Nooney Realty Trust, Inc.*, 966 S.W.2d 399, 402 (Mo. App. 1998), *quoting Kelley*, 595 S.W.2d at 268. The decision of the Cole County Circuit Court was issued at about 10 a.m. on Friday, May 21. That day, the Attorney General filed writ cases in the Supreme Court and the Western District Court of Appeals. Clearly, the Attorney General could have filed an expedited appeal of the declaratory judgment case.

Therefore, the Attorney General has an adequate remedy at law available, and this Court should dismiss this petition.

III. The Petition for Writ of Mandamus should be dismissed because the Secretary has performed all non-discretionary duties assigned to him by section 116.160 and concedes that the twenty-day time period for his preparation of the ballot summary statement began running on May 28, 2004 (Third Affirmative Defense).

"Mandamus cannot be used to control the judgment or discretion of a public official." *State ex rel. Missouri Growth Association v. State Tax Commission*, 998 S.W.2d 786, 788 (Mo. banc 1999). The Secretary has already performed all his non-discretionary duties assigned to him when he received SJR 29 on May 28, 2004. The resolution was promptly transmitted to the auditor and the Secretary has begun the process of preparing a ballot summary statement. Letters of advice have been requested from both the presiding officer of the Senate and the sponsor of the bill, as is plainly allowed under section 116.160.

Section 116.160 vests the Secretary with discretion on how long he will take to write the ballot summary statement, so long as he does not take over twenty days. There is no language indicating that he may take the full twenty days for complex issues, but for simple issues he only has two hours. This Court cannot compel him to exercise his discretion within a certain time, at least under current accepted and understood principles of mandamus. *State ex rel. Kavanaugh v. Henderson*, 169 S.W.2d 389, 392 (Mo. 1943) ("Mandamus will not lie to

compel a person or officer to do something when action in the premises. on the part of such person or officer is discretionary . . .").

Therefore, because the only action that is left to the Secretary is discretionary, mandamus is not an appropriate remedy and this petition should be dismissed.

IV. The Petition for Writ of Mandamus should be dismissed as moot because of the statutory requirements set out in section 116.240 (Fourth Affirmative Defense).

Article XII, section 2(b) states "[a]ll amendments proposed by the general assembly or by the initiative shall be submitted to the electors for their approval or rejection by official ballot title *as may be provided by law*, on a separate ballot without party designation, at the next general election, or at a special election called by the governor prior thereto." (emphasis added). This constitutional provision vests in the governor the authority to call a special election on constitutional amendments prior to the next general election "as may be provided by law." The Attorney General argues that the governor has unfettered ability to call a special election. However, no one would argue that the governor could call a special election today to take place tomorrow. There are restrictions on his authority; the reasonable restraints placed on all elections by the General Assembly provided for by law.

Section 116.240 is such a restraint and states that "not later than the tenth Tuesday prior to an election at which a statewide ballot measure is to be voted on,

the secretary of state shall send each election authority a certified copy of the legal notice to be published. The legal notice shall include the date and time of the election and a sample ballot."

Section 116.240 has not always required ten weeks of notice. Prior to 1997, section 116.240 only required the Secretary of State to give local election authorities eight weeks of notice. (Berry Aff. at 1, Exh. 1 to Respondent's Answer). In 1997, the General Assembly passed SB 132, amending 116.240 and increased the notice period to ten weeks. (1997 Mo. Laws 429; Berry Aff. at 1, Exh. 1 to Respondent's Answer). SB 132 was signed into law by Governor Carnahan. (Struckhoff Aff. at 1, Exh. 2 to Respondent's Answer). This change, from eight to ten weeks, occurred, at least in part, due to the lobbying effort of the Missouri Association of County Clerks. (Berry Aff. at 1, Exh. 1 to Respondent's Answer). A major reason for this change was the concern of county clerks about sending out absentee ballots to overseas voters, such as military personnel. (Berry Aff. at 1, Exh. 1 to Respondent's Answer). Section 115.281 requires that absentee ballots be available to voters six weeks prior to the election, and overseas absentee ballots generally must be mailed six weeks before the election to allow them to be voted and returned by election day as section 115.293 requires. (Berry Aff. at 1, Exh. 1 to Respondent's Answer). Also, the Federal Voting Assistance Program (FVAP) in the Office of the United States Secretary of Defense administers the federal responsibilities of the Secretary under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). FVAP asks the states to allow a

minimum of forty-five days (six weeks and three days) between the date the ballot is mailed out and the date it is due to the local election official. (Exh. 4 to Respondent's Answer at 1).

According to Ms. Berry, under the eight-week notice rule, "it was . . . difficult to have the ballots printed in time for absentee voting." (Berry Aff. at 1, Exh. 1 to Respondent's Answer). The "ten weeks notice as opposed to eight is much more reasonable because it provides election authorities adequate time to prepare and conduct an orderly election." (Berry Aff. at 1, Exh. 1 to Respondent's Answer). In fact, according to Wendy Noren, Boone County Clerk and leader of legislative lobbying efforts for the Missouri Association of County Clerks and Election Authorities, "'|t|here aren't a lot of printers who can handle the size of orders we deal with, and we weren't meeting our deadlines to get these ballots out with the eight-week notification." (Exh. 3 to Respondent's Answer). Therefore, the ten-week notice requirement is a recent enactment of the General Assembly and is evidence of their desire for statewide elections to be conducted in an organized manner.

In order for this Court to rule for the Attorney General, it would have to legislate from the bench and overrule the General Assembly's constitutional authority to direct for the orderly process of elections, general or special. This course plainly violates the separation of powers, which is "vital to our form of government." *State Auditor v. Joint Committee on Legislative Research*, 956 S.W.2d 228, 231 (Mo. banc 1997). "A careful reading of article III shows that the

constitution assigns the General Assembly the single power and sole responsibility to make, amend, and repeal laws for Missouri." *Id.* at 230. "It is the duty of the courts to apply the law as written by the Legislature, and where the legislative language is clear and unambiguous the courts have no authority to do other than to obey the legislative command. This position is so obvious and well settled that no authorities need be cited to support it." *Camden v. St. Louis Public Service Co.*, 206 S.W.2d 699,702-03 (Mo. App. 1947). *See also State ex rel. Bush-Cheney 2000, Inc. v. Baker*, 34 S.W.3d 410, 412 (Mo. App. 2000).

The General Assembly has made its intent known that local election authorities should have at least ten weeks notice of what will appear on the ballot, and that such time is reasonably necessary to ensure an orderly election. If Governor Carnahan did not agree with the General Assembly that the ten-week requirement was constitutional, or at least reasonable, he could have vetoed it instead of signing it. This Court should not now disregard this legislative mandate and insert its own requirements.

Therefore, the Petition is moot and the Secretary requests that the Court dismiss the Petition.

CONCLUSION

For the reasons set out above, Secretary of State Matt Blunt respectfully asks that the court dismiss the Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing document were hand delivered on this 31st day of May, 2004, to the following:

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